

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Case # 15-CR-00098-FPG-HKS-2

v.

DECISION AND ORDER

ANTHONY NEWBERN,

Defendant.

INTRODUCTION

On May 6, 2015, the Government charged Defendant Anthony Newbern with a violation of 21 U.S.C. § 846 in a one count Indictment. *See* ECF No. 1. Specifically, the Government alleges that Defendant took part in a narcotics conspiracy with a number of codefendants. *Id.* The same day, the Court referred the case to United States Magistrate Judge H. Kenneth Schroeder pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (b)(1)(B). ECF No. 2.

On October 8, 2016, Defendant filed an omnibus motion in which he moves to dismiss the Indictment as to him because there is insufficient evidence to support the allegations against him. *See* ECF No. 150, 2-4 at ¶¶ 6-7, 16. Judge Schroeder filed a Report, Recommendation, and Order (“R&R”) regarding Defendant’s motion on November 16, 2017, which is currently before the Court. ECF No. 266. For the reasons that follow, the Court accepts and adopts the Judge Schroeder’s R&R in its entirety, and Defendant’s Motion to Dismiss the Indictment is DENIED.

LEGAL STANDARD

In reviewing an R&R, the Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). When no objections are filed, this Court is not required to conduct a *de novo* review of a magistrate judge’s

R&R. *Thomas v. Arn*, 474 U.S. 140, 150 (1985) (“It does not appear that Congress intended to require district court review of a magistrate’s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings”).

DISCUSSION

Since Defendant did not file any objections to Judge Schroeder’s R&R, the Court may accept and adopt the R&R in its entirety without further judicial review. Nonetheless, the Court will review Judge Schroeder’s R&R for clear error.¹ Under this standard, the Court is permitted “to adopt those sections of [a magistrate judge’s] report to which no specific objection is made, so long as those sections are not facially erroneous.” *Batista v. Walker*, No. 94 CIV. 2826 (SS), 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995).

The Court has reviewed Judge Schroeder’s R&R and does not find any portion of it to be “facially erroneous.” In his motion, Defendant argues that the Court should dismiss the Indictment because there is insufficient evidence supporting it. *See* ECF No. 150, 2-4. It is well established, however, that “an indictment need do little more than[] track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.” *United States v. Yannotti*, 541 F.3d 112, 127 (2d Cir. 2008) (citing *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998)). Here, the Indictment does just that.²

Moreover, as Judge Schroeder notes in his R&R, the Court cannot “dismiss a facially valid indictment based on insufficient evidence.” *United States v. Ortiz*, 666 F. Supp. 2d 399, 406

¹ The “clear error” review standard applies to the portions of an R&R that a party does not object to when the party does object to some portion of the R&R, or when a party’s objections are conclusory, general, or without legal support. *See United States v. Preston*, 635 F. Supp. 2d 267, 269 (W.D.N.Y. 2009) (citing *Cullen v. United States*, 194 F.3d 401, 405-07 (2d Cir. 1999)); *see also* Fed. R. Crim. P. 59(b)(2); Loc. R. Crim. P. 59(c)(2).

² Notably, Defendant does not argue that the Indictment is facially defective. *See* ECF No. 150, 2-4.

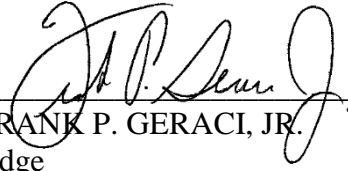
(S.D.N.Y. 2009) (citing *United States v. Calandra*, 414 U.S. 338, 345 (1974)). Therefore, the Court must deny Defendant's motion.

CONCLUSION

The Court accepts and adopts the Report, Recommendation, and Order filed by United States Magistrate Judge H. Kenneth Schroeder (ECF No. 266) in its entirety, and Defendant's Motion to Dismiss the Indictment (ECF No. 150) is DENIED.

IT IS SO ORDERED.

DATED: December 7, 2017
Rochester, New York



HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court